United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4268

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NIAGARA UNIVERSITY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board abused its discretion in excluding seventeen Vincentian priests from a bargaining unit of all other full-time faculty at the University.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Niagara University (the University) to review and set aside an order of the National Labor Relations Board issued by a three-member panel of the Board consisting of Chairman Murphy and Members Fanning and Penello. The Board's Decision and Order was

issued November 17, 1976, and is reported at 226 NLRB No. 154 (A. 26).[1/] The Board has cross-applied for enforcement of its order. The Court has jurisdiction under Sections 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151 et seq.), the unfair labor practice having occurred at Niagara, New York.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

Niagara University is a Catholic college located in Niagara, New York, which was founded by the Congregation of the Mission, otherwise known as the Vincentian Order. It is staffed by a faculty that is in part lay and in part religious. On August 8, 1975, the Niagara University Lay Teachers Association (the Union) filed a representation petition with the Board seeking to represent a bargaining unit comprised of all full-time lay faculty employed at the University (A. 1). At the representation hearing, the University contended that only a unit including all full-time faculty, both lay and religious, would be appropriate (A. 28; RC Tr. 21).

Under the decision of the Regional Director (A. 2-6) as modified by the Board (A. 7), four of the twenty-one religious faculty were allowed to vote subject to challenge (A. 28-29). The remaining seventeen, all

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1/ "A." references are to the abbreviated joint appendix. References to the transcript and joint exhibits in the underlying representation case [3-RC-6410] will be designated "RC Tr." and "RC Jt. Ex." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

members of the Vincentian Order, Eastern Province, were excluded because they did not "share a community of interest with the lay faculty" (A. 5).[2/] The Union won the election by a vote of 81 to 46 with the four challenged ballots insufficient to affect the outcome (A. 39).[3/] On December 29, 1975, the Union was certified by the Board as the exclusive representative of the approximately 134 full-time lay faculty (A. 8).

B. The Unfair Labor Practice Proceeding

On April 12, 1976, the University sent employment contracts for the 1976-77 academic year directly to the faculty represented by the Union. On May 3 the Union requested that the University bargain with respect to rates of pay, wages, hours and other terms and conditions of employment of the employees in the unit (A. 19, 21). The University refused to bargain with the Union in order to obtain judicial review of the Board's unit determination (A. 19, 22).

The Union filed an unfair labor practice charge, and on June 7, 1976, the Board issued a complaint charging the University with refusing

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2/ The Union sought to have five or possibly six of the seventeen Vincentians excluded on the additional ground that they were part-time faculty (A. 5 n.5; RC Tr. 23). Although the record supports this contention (RC Tr. 36-56), the Board did not specifically find that these Vincentious were part-time employees and therefore not properly included in the unit. Rather the Board excluded them on the same grounds as it excluded the other Vincentians (A. 5 n. 5).

3/ The challenges to the four religious allowed to vote were never decided in the representation proceeding. The four were, however, eventually included in the unit as a result of the Board's decision in a subsequent unit clarification proceeding (A. 39-47). See note 4, infra.

to bargain with the Union in violation of Sections 8(a)(5) and (1) of the Act (A. 17-20). On June 15 the University answered admitting its continuing refusal to bargain and defending on the grounds that (1) the unit was inappropriate because it excluded full-time religious faculty and (2) a unit clarification proceeding concerning the four religious faculty allowed to vote subject to challenge was then pending[4/] and the University's motion for reconsideration of the decision in the representation case and consolidation with the unit clarification case had not yet been decided by the Board (A. 22). On July 22 the Board denied the motion for reconsideration and consolidation, finding that it was untimely filed and raised no issue not already considered in the representation case (A. 24-25). After receiving the University's answer, the General Counsel filed a motion for summary judgment (A. 27), which was opposed by the University for the same reasons specified in the answer (A. 27-28).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board granted the General Counsel's motion for summary judgment, holding that the University had violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the certified representative

4/ The University had filed a petition for unit clarification on February 10, 1976, asking that the four religious allowed to vote subject to challenge be included in the unit (A. 9-10). On December 17, 1976, a month after its decision in the unfair labor practice proceeding, the Board decided that the four were properly part of the unit (A. 39-47). The unit clarification case is not before this Court and we do not understand the University to question the Board's decision in that case.

of its employees (A. 32-33). The Board rejected the University's objections to the bargaining unit because they had already been considered and rejected in the representation proceeding (A. 30). The Board found that the pendency of the unit clarification petition was no defense to the University's refusal to bargain, since the unit clarification questions neither the basic appropriateness of the unit, the Union's majority, or the ability of the parties to bargain in the certified unit (A. 30).

The Board ordered the University to cease and desist from refusing to bargain with the Union, from offering, soliciting, and inducing its employees to enter into individual employment contracts in derogation of the Union's status as exclusive bargaining agent, and from "in any like or related manner" interfering with its employees' Section 7 rights. Affirmatively, the Board's order requires the University to bargain with the Union upon request and to post appropriate notices (A. 35-36).

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE VINCENTIANS FROM THE BARGAINING UNIT OF FULL-TIME FACULTY MEMBERS

A. Applicable Principles

The only question before this court is whether the Board's unit determination--which excludes the seventeen Vincentian faculty members from the basic bargaining unit of all full-time faculty members--is both within its discretion and not otherwise unlawful, for these are the sole grounds on which the University defends its admitted refusal to bargain. Accordingly, if the unit is appropriate, the University's

refusal to bargain violates Section 8(a)(5) and (1) of the Act. Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941).

Congress has given the Board wide discretion in determining what unit is appropriate. Section 9(b) of the Act provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in excercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. §158(b). The object of the Board's determination is to ensure that the employees in the unit have interests in wages and terms of employment sufficiently similar to allow them to act as a reasonably cohesive whole. This determination is largely factual, and as the Supreme Court has said, the Board's decision "involves a large measure of informed discretion, and if not final, is rarely to be disturbed." Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491 (1947). Accord, Nazareth Regional High School v. N.L.R.B., ____ F. 2d_____, 94 LRRM 2897, 2900 n. 3 (C.A. 2, No. 76-4076, decided February 28, 1977); Wheeler-Van Label Co. v. N.L.R.B., 408 F. 2d 613, 616-17 (C.A. 2, 1969), cert. denied, 396 U.S. 834. This Court has recognized that when supported by substantial evidence the Board's unit finding will not be reversed "in the absence of an 'arbitrary or capricious excercise of administrative discretion.'" Empire State Sugar Co. v. N.L.R.B., 401 F. 2d 559, 562 (C.A. 2, 1968).

The Board has developed criteria to guide the excercise of its discretion. The chief consideration is the "community of interests" shared by the employees. "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit." Continental Baking Co., 99 NLRB 777, 782 (1952). Accord, Wheeler-Van Label Co. v. N.L.R.B., supra; United Aircraft Corp. v. N.L.R.B., 333 F. 2d 819, 822 (C.A. 2, 1964), cert. denied, 380 U.S. 910.

The Board's approach to the grouping of religious faculty with lay faculty for the purpose of collective bargaining at religiously-sponsored schools has evolved case-by-case. The leading Board decision in this area, Seton Hill College, 201 NLRB 1026 (1973), involved a College owned and operated by an order of sisters. Among the faculty were members of the Order. These sisters received the same salary as other faculty and had the same working conditions. They had, however, taken a vow of poverty and their salaries were paid directly to the Order. The Order in turn provided the sisters with free on-campus housing, allotting the sisters only living expenses and returning the remainder of their salaries to the College. The sisters also had separate health and life insurance and pension programs. In addition, they had taken a vow of obedience to the Mother General of the Order, who was also a member of the board of trustees of the College. Half the members of the board of trustees were members of the Order. On these facts the Board found that the sisters did not share a sufficient community of interest with the lay faculty for two reasons: (1) "the economic

interests of the lay faculty and sisters do not coincide," and (2) as a result of their close relationship with the College the sisters were "subject to a conflict of loyalties." 201 NLRB at 1027. Even though the sisters were nominally paid the same wage as other faculty members, their practice of returning a substantial portion of their wages to the College, as well as their separate arrangements for health and life insurance and pension, led the Board to conclude that the lay and religious faculty did not share a community of economic interest.

The Board, relying on its Seton Hill decision, has subsequently excluded religious teachers from a lay unit soley because the economic interests of the two groups were not the same. Roman Catholic Diocese of Brooklyn and Nazareth Regional High School, 222 NLRB 1052, 1053 n. 6 (1976). In affirming the Board's determination in that case this Court stated (Nazareth Regional High School v. N.L.R.B., supra, 94 LRRM at 2900 n. 3):

> Nazareth contends that the unit is inappropriate because it improperly excludes the religious faculty. Although subject to the same conditions of employment and holding positions of equal responsibility, the members of the religious faculty are paid substantially less than the lay faculty. The NLRB has wide discretion in determining the appropriate bargaining unit, Wheeler-Van Lable Co. v. N.L.R.B., 408 F. 2d 613, 616-17 (2d Cir.), cert. denied, 396 U.S. 834 (1969), and the exclusion of a group of employees because of substantial variance in pay scale was a proper exercise of discretion. The unit of non-supervisory, full-time, lay faculty is appropriate.

See also Catholic Charities of Buffalo, 220 NLRB 9 (1975); Carroll Manor Nursing Home, 202 NLRB 67 (1973).

The Board's later decision in D'Youville College, 225 NLRB No. 104, 92 LRRM 1578 (1976), to include religious faculty in a faculty bargaining unit illustrates its case-by-case approach and the importance of the community of interest standard. Unlike Seton Hill both the Union and College agreed that the religious faculty should be included in the bargaining unit. Also unlike Seton Hill, the Order to which the religious belonged, although represented on the College board of trustees, neither owned, operated, nor controlled the College. As in Seton Hill the religious had taken the vow of poverty and returned the excess of their salaries over living expenses to the College. In deciding that despite the difference in economic interest the religious and lay faculty shared a community of interest sufficent to warrant placing them in a single unit, the board relied heavily on the parties' own judgment. "It is, of course, they who are closest to the situation and, thus, it is to be expected that they would reach an informed, responsible decision as to what will provide a satisfactory basis for collective bargaining." 92 LRRM at 1579. See also Metropolitan Life Ins. Co. v. N.L.R.B., 328 F. 2d 820, 826 n. 14, 825-27 (C.A. 3, 1964), vacated on other grounds, 380 U.S. 523 (1965).

As the Board's decisions in both D'Youville College and the unit clarification case involving the instant bargaining unit (A. 39-47) demonstrate, the Board does not automatically exclude religious faculty

from bargain units. Nor is the Union's unit preference controlling. For when, as in the instant unit, a religious faculty member is not associated with the order operating the College and that member's wages and other working conditions are indistinguisable from those of the lay members, the Board will group the religious and lay members together in a bargaining unit even though the union objects.

B. The Board properly found that the seventeen Vincentian priests lacked the requisite community of interest with the other faculty at the University

The Board's exclusion of the seventeen Vincentians, while later including four other religious in the bargaining unit, is based on the Board's finding (A. 5) that the Vincentians did not share a community of interests with the other faculty and is fully consistent with the Board's previous decisions.[5/] Although sharing similar working conditions with other faculty, the Vincentians have a clearly distinct interest in wages. While they nominally receive the same wages as the other faculty (A. 4; RC Tr. 65, 101), they do not receive individual checks (RC Tr. 100). Rather, their wages are paid directly to the Vincentian Order (RC Tr. 100-01), and they receive only an allowance for their personal needs amounting to approximately forty dollars a month (RC Tr. 108). The priests live in a building owned by the University; neither they nor the Province to which they belong pays any

5/ The seventeen Vincentians who were excluded are all priests and members of the Congregation of the Mission, Eastern Province. The four other religious are three nuns from different religious orders and one priest, Father Lachowski, who is a Vincentian, but of the New England Province. (A. 3-4; RC Tr. 22-23.) Except where otherwise noted, the term Vincentian is used to refer to members of the Eastern Province.

rent (RC Tr. 129-30). The Order does pay for their food and for cleaning and upkeep of the building (Ibid.). That part of their total salaries not used for upkeep minus "some possible reserve is . . . returned to the University as a gift." (RC Tr. 134.) This gift is substantial: $1,200,000 during the previous nine years (RC Tr. 133), or more than $130,000 year compared to the approximately $40,000 a year paid by the community to the Order (RC Tr. 134) and whatever other expenses are incurred.

The University suggests (Br. 40-42) that this gift is no different than one given by any other member of the faculty. The record, however, reasonably supports the inference that an individual Vincentian has no real power to prevent the payment to the University. Whether as part of their vow of obedience or not, the Vincentians have agreed to obey both the superior of their community and the Provincial of the Order. The Vincentian faculty are not under a written contract to teach at the University (RC Tr. 58) nor do they receive tenure as do the lay faculty (RC Tr. 63). The Order has ultimate authority over where the priests are assigned (RC Tr. 117-20) and may remove them from their posts at the University without recourse to the University board of trustees (RC Tr. 60, 63-64). Whether or not this ultimate power is exercised, it renders the actions of the Vincentians less than completely voluntary. Furthermore, the individual Vincentian has control of neither the money he earns nor the property he owns. Salaries are the corporate income of the Order and whatever the Vincentian owns cannot be used without the permission of the Order. (RC Tr. 98-99, 102.) Nor may the Vincentians, as may other faculty, request that deductions be made from their salaries and sent directly to their banks (RC Tr. 127).

Moreover it is difficult to believe that the excess of salary above living expenses is not automatically returned to the University or would ever be contributed to any other institution. The Order has a substantial interest in the well-being and continued existence of the University. The University was founded by the Vincentians and remains a "Vincentian institution of higher education" (Statutes of Niagara University, RC Jt. Ex. 2, at p. 3). Five members of the University board of trustees including the chairman are Vincentians (A.3; RC Jt. Ex. 1, at p. 175). Under the Statutes of the University, the Provincial of the Eastern Province of the Order is automatically a member of the board, and the president of the University, who is also an ex officio member of the board and who is charged with the management of the University, must also be a Vincentian although not necessarily of the Eastern Province (A. 3; RC Jt. Ex. 1, at p. 3, 6-7).

In short, the record shows that although the Vincentians nominally receive the same salary as other faculty, they receive the economic benefit of substantially less and have a correspondingly different economic interest. Nor is the decision to remit the unused portion of their salary voluntary for the order retains the ultimate power to remove a priest from duty at the University as well as control of his salary. 6/ In effect, then, as a practical

6/ The University argues that the Board is inconsistent in including Father Lachowski, a Vincentian of the New England Province, in the bargaining unit but excluding the Vincentians of the Eastern Province (Br. 34, 40-43). There is no evidence, however, that either Father Lachowski or the three nuns included in the unit return any part of their salaries to the University. Their actual as well as nominal salary is, therefore, identical to that of the lay faculty.

result of the forced rebate, the University is paying its religious faculty a salary substantially less than the salary it is paying to its lay faculty. This case, therefore, is indistinguishable from the Nazareth case (supra, pp. 8-9) in which this Court specifically upheld the Board's Seton Hill principle excluding the religious faculty from a unit of lay faculty because of a significant difference in wages. The Nazareth case is direct precedent for the Board's action here and supports enforcement of its order.

C. The exclusion of the Vincentians violates neither the Constitution nor Title VII of the Civil Rights Act of 1964

The University argues (Br. 28-37) that the Vincentians were excluded from the bargaining unit because of their religion and that their exclusion therefore violated their right to equal protection as guaranteed by the Fifth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c).[7/] On the contrary, the Vincentians were not excluded because of their religion. It is quite clear that the Board is not, as the

7/ The University's claim that the Board's exclusion of the Vincentians is inconsistent with Title VII is clearly incorrect. The Civil Rights Act prohibits employers and unions from, inter alia, segregating employees because of their religion. See 42 U.S.C. §2000e, et seq. Obviously, the Act was never meant to prevent the Board from performing its congressionally commissioned function of administering the National Labor Relations Act. Moreover, as we show in the text the Vincentians were not excluded because of their religion, but because their inclusion in the bargaining unit would be contrary to established Board practice. They have, therefore, been excluded not arbitrarily and capriciously but in furtherance of the Act's mandate to guarantee the "fullest freedom" to excercise their collective rights.

(cont'd)

the University strenuously argues (Br. 33-34), excluding religious simply because they take vows of poverty or obedience. Indeed, although they had taken vows of poverty and obedience indentical to those taken by the Vincentians, Father Lachowski and three nuns were included in the instant unit. (A. 35-47.) See also D'Youville College, supra.

7/ (footnote Continued)

Further, the exemption within Title VII for educational institutions with respect to employees of particular religions (42 U.S.C. §2000e-2(e)) is a congressional determination that the relationship between a religious college and its faculty should not be subject to the usual Title VII religious non-discrimination standards. The University here argues that the Board cannot make a similar determination with respect to the relationship between a religious University and its religious faculty under the Act. Yet both the exemption under Title VII and the Board's exclusion of religious faculty from bargaining units under the Act are efforts to accomodate the national employment law to the unique relationship existing in the context of religious education. Simply recognizing that such relationships exist, and accord[illegible] special status to them under the law so that they will not be compromised, is entirely consistent with both principles of religious freedom and religious nondiscrimination.

It is, of course, true that both employer and union must reasonably accommodate the religious practices of their employees and members. Hardison v. Trans World Airlines, Inc., 527 F. 2d 33 (C.A. 8, 1975), cert. granted, 97 S. Ct. 381 (1976). But the "balancing of important competing interests must be done on a case by case basis" and accomodations need not be made if they entail undue hardship. Id. at 43. In the instant case reasonable accommodation does not require diminishing the collective rights of the other faculty. See, District Court opinion in Hardison, 375 F. Supp. 877, 883-84 (W.D. Mo., 1974) (duty to accomodate does not require exception to seniority system); Reid v. Memphis Publishing Co., 521 F. 2d 512, 517 (C.A. 6, 1975); Johnson v. U.S. Postal Service, 497 F. 2d 128 (C.A. 5, 1974).

Rather, the Board's community of interest standard and the more specific inquiry into economic interest are facially neutral with respect to religion and are applied with equal force to both religious and nonreligious. Nonreligious employees have, in fact, been excluded from bargaining units precisely because they were paid substantially different wages. E.g., University of Miami, 213 NLRB 634, 636 (1974) (medical school faculty excluded from faculty unit because they received substantially higher wages); Capitol City, Inc., 212 NLRB 418 (1974). Nor, as is evident from the Board's decision to include four other religious in the faculty unit at the University (A. 39-47), does application of the economic interest standard to religious automatically result in their exclusion from the bargaining unit. See also D'Youville College, supra; Seton Hill College, supra (although nuns who were members of the order that owned and operated the College were excluded from the unit, one nun from a different order and two priests were not).

The Board's decision in D'Youville and the unit clarification proceeding related to instant case to include certain religious in faculty units do not undermine the Board's decision to exclude the Vincentians. These decisions show only that the Board will exclude religious from bargaining units only when required by its traditional tests.

Nor has the Board, as the University suggests (Br. 38-39), disregarded its finding that the manner in which an employee spends his or her salary is irrelevant (A. 45 n. 6). For as the Board carefully noted (A. 45 n. 7), it remains relevant whether all or part of an employee's salary is returned

to the employer. To thus examine the financial arrangements of the Vincentians is not to subject them to special treatment because of their religion but only to ask whether in reality they receive the same compensation as other faculty.[10/] In short, the University's argument that the Board has applied a different standard to the Vincentians is false. In fact the Board has applied the same standard and what the University seeks is not equal treatment but special treatment for the Vincentians.

Furthermore, contrary to the University's argument (Br. pp. 31-36) the, Board's neutral standard does not unconstitutionally burden the free excercise of religion because it excludes the Vincentians without a compelling state interest. Initially it should be noted that this same argument was made to this Court in Nazareth Regional High School v. N.L.R.B., supra, by the employer Nazareth Regional High School (Br. 31-33) and opposed by the Board (Br. 27-28). Although the Court did not discuss this issue in its opinion, it must have implicitly rejected the employer's argument since it upheld the Board's unit determination.

In any event, the Constitution requires a compelling state interest only when the state demands that a person act contrary to religious belief. Wisconsin v. Yoder, 406 U.S. 205 (1972) (mandatory school attendance contrary to religious belief); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation because plaintiff would not work on Saturday contrary to her religious belief). See Cap Santa Vue, Inc. v. N.L.R.B., 424 F. 2d 883 (C.A. D.C., 1970) (employer required to bargain

10/ No evidence was produced to show that any other faculty members returned a substantial portion of their salaries to the University.

with union contrary to his religious belief). The Board's action in the instant case does not require the Vincentians to act contrary to any religious belief, for the Vincentians do not claim that the tenets of the Catholic religion (or the Vincentian order) obligate them to seek placement in a particular unit otherwise appropriate for purposes of collective bargaining. Rather the "burden," if any, on the Franciscans' right to practice their religion is incidental and minor. It is in this context, we submit, that the Court must balance the "burden" against the interests served by the Board standards. See Railway Employees Dep't v. Hanson, 351 U.S. 225, 236-38 (1956); Yott v. North American Rockwell Corp., 501 F. 2d 398 (C.A. 9, 1974); Linscott v. Millers Fall Co., 440 F. 2d 14 (C.A. 1, 1971), cert. denied, 404 U.S. 872. Cf. United States v. O'Brien, 391 U.S. 367 (1968) (incidental burden on free speech).

Clearly, the balance -- if one needs to be struck -- is in favor of the Board's decision. First, the burden does not result either from the practice of religion or adherence to the vows of proverty and obedience, but from the fact that the Vincentians have economic interests substantially different than the other faculty. Second, whatever the burden, it is clearly less serious than other burdens, such as loss of employment, that have been sustained by other courts. E.g., Yott v. North American Rockwell Corp., supra; Cooper v. General Dynamics, 378 F. Supp. 1258 (N.D. Tex. 1974). Third, the burden is at best minor, for the Board has not held that the Vincentians may not form a separate unit. Fourth, the Board has narrowly limited exclusion of religious to just those situations in which their inclusion would interfere with the fullest freedom of other employees to excercise their rights

to engage in collective action. See D Youville College, supra, and the Board's unit clarification decision (A. 37-45). It is apparent, then, that the interest of other employees in excercising to the fullest their rights guaranteed by the Act -- the rights conferred by Section 9(b) of the Act which the Board vindicated by forming the collective bargaining unit in isssue here -- substantially outweighs whatever minor hardship is imposed on the Vincentians. Cap Santa Vue, Inc., v. N.L.R.B., supra, 424 F. 2d at 890-91.

D. The pendency of the unit clarification petition did not excuse the University from its duty to bargain with the Union

A pending petition for clarification of the bargaining unit does not relieve an employer of its duty to bargain with the certified representative of the unit as currently constituted. Landis Tool Co., Div. of Litton Indus., 203 NLRB 1025, 1026 (1973), enforced, 87 LRRM 2127 (C.A. D.C., 1974) (summary order); Glen-Manor Home, 196 NLRB 1166, 1166 n.2 (1972), enforced, 474 F.2d 1145 (C.A. 6. 1973), cert. denied, 414 U.S. 826; The May Dep't Store Co., 186 NLRB 86 (1970), enforcement denied on other grounds, 454 F.2d 148 (C.A. 9, 1972). The only issue in a unit clarification proceeding is the proper placement of a limited number of employees. The placement of these employees can affect neither the basic appropriateness of the unit, the Union's majority, nor the ability of the parties to bargain with regard to the wages or terms and conditions of employment of the employees in the certified unit. For, as this court has held, a unit clarification petition raises no question concerning

the Union's status as certified representative, Westinghouse Electric Corp. v. N.L.R.B. 440 F. 2d 7, 10-11 (C.A. 2, 1971), cert. denied, 404 U.S. 853, and thus it cannot excuse an employer from its duty to bargain with the Union representing the employees in the basic certified unit.

These principles support the Board's conclusion that in the instant case the University's petition for clarification of the instant unit was no defense to its admitted refusal to bargain with the Union. The petition requested only that the four religious allowed to vote subject to challenge be included in the unit (A. 9-10). The petition did not and could not have raised any issue previously litigated and decided. The placement of the four could have no effect on the Union's majority status since it had won the election 81 to 46 (A. 29, 39). The University's proper response to the Union's bargaining request was to bargain concerning the wages and terms and conditions of employment of the faculty in the unit as it then stood. Instead, the University refused to bargain with respect to the unit as then certified and in fact approached employees individually by sending them employment contracts for the next academic year.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court enter judgment denying the University's Petition for Review and enforcing the Board's order in full.

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April 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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v.	)	No. 76-4268
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 21st day of April, 1977.